SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000313-001 DT 08/11/2005

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

KENT MARKS

JAMES J SYME JR.

v.

GEORGE T ANAGNOST (001)
STEPHEN M KEMP (001)

HON GEORGE T ANAGNOST
PEORIA MUNICIPAL COURT
8401 N MONROE
PEORIA AZ 85345
ANH T SPIEK

PEORIA CITY COURT

RULING

This Petition for Special Action has been under advisement since the time of oral argument on June 13, 2005. This Court has considered and reviewed the record of the proceedings from the Peoria Municipal Court and the excellent pleadings and memoranda submitted by counsel.

I. Jurisdiction

This Court has jurisdiction over special actions pursuant to the Arizona Constitution Article, VI, Section 18, and Rule 4(b), Arizona Rules of Procedure for Special Actions.

The exercise and acceptance of special action jurisdiction is highly discretionary,[1] and therefore, the decision to accept jurisdiction encompasses a variety of determinants.[2] Acceptance of special action jurisdiction is appropriate where an issue is one of first impression regarding a purely legal question, is of statewide importance, and is likely to arise again. In this matter, special action jurisdiction will be exercised to resolve a purely legal question of whether

[1] *Blake v. Schwartz*, 202 Ariz. 120, 42 P.3d 6 (App. 2002); *Haas v. Colosi*, 202 Ariz. 56, 40 P.3d 1249 (App. 2002).
[2] *State v. Jones ex rel. County of Maricopa*, 198 Ariz. 18, 6 P.3d 323 (App. 2000).

the Petitioner, Kent Marks, is entitled to a jury trial for the charge of Threatening and Intimidating. Moreover, there is a clear issue presented here of county-wide importance to all limited jurisdiction courts, that is likely to arise again. This Court will accept special action jurisdiction in this case.

II. Factual and Procedural Background

This is a Special Action Petition from the Peoria Municipal Court. The only issue presented in this case is whether the trial judge (the Honorable George T. Anagnost, Peoria Municipal Court Judge, who is a Respondent herein) erred in denying Petitioner a jury trial for the misdemeanor charge of Threatening and Intimidating. The State, Real Party in Interest, has charged Kent Marks with the charge of Threatening and Intimidating in violation of A.R.S. § 13-1202(A). On February 23, 2005, counsel for Petitioner filed a Memorandum in Support of Demand for Jury Trial. This motion was denied by the Honorable George T. Anagnost on March 28, 2005. Petitioner then commenced this Petitioner for Special Action on May 6, 2005.

III. Issue Presented in this Case

The Petitioner asserts in this Special Action Complaint that (1) Judge Anagnost abused his discretion in denying Petitioner a jury trial for the misdemeanor offense of Threatening and Intimidating; (2) argues that the offense of Threatening and Intimidating was a common law offense pursuant to Arizona Territorial law; (3) and that Article II, Sections 23 and 24 of the Arizona Constitution preserve a territorial statutory right to a jury trial. The Petitioner requests that this Court reverse the Order of the Peoria Municipal Court and remand the matter back to the trial court directing that Defendant be granted a trial by jury.

IV. Discussion of the Issues

Recently, the Arizona Supreme Court announced its decision in *Derendal v. Griffith*.[3] There, the court was asked to consider whether Arizona should retain the previous test set out in *Rothweiler v. Superior Court*,[4] to determine when the Arizona Constitution mandates that a criminal offense be eligible for trial by jury. In *Rothweiler*, the court fashioned a test to determine whether a Defendant is entitled to a jury trial in a particular criminal offense. Under that test, the court looked to: (1) the relationship of the offense to the common law crimes; (2) the severity of the statutory penalties that apply; and (3) the moral quality of the act.[5] In *Derendal*, the court modified the test by eliminating the moral quality element. The court held

[3] *Id.*
[4] 100 Ariz. 37, 410 P.2d 479 (Ariz. 1966), *overruled in part.*
[5] *Id.* at 42.

that the current analysis of jury trial eligibility of misdemeanor offense requires a two step process. First, the court must determine whether a statutory offense has a common law antecedent that guaranteed a right to a trial by jury at the time of Arizona statehood.[6] If so, the inquiry concludes. If there is no common law antecedent for which a jury trial was required, the court must determine whether the offense is "serious" enough to warrant a jury trial.[7]

A. The Right to a Jury Trial for Misdemeanor Cases at Common Law in Arizona

Article II, Section 23 of the Arizona Constitution provides that the right to a jury trial "shall remain inviolate", and preserves the right to a jury trial as it existed at the time Arizona adopted its constitution.[8] Jury eligibility is firmly linked to an offense's common law status, not a pre-statehood statutory entitlement. Thus, the constitution requires that the state guarantee the right to a jury trial to a defendant where the offense charged was granted a jury trial at common law prior to statehood.[9]

Where the right to a jury trial existed for an offense prior to statehood, the right cannot be denied for modern statutory offenses of the same "character or grade."[10] To constitute a common law jury-eligible offense as an antecedent to a modern offense, the modern offense must contain elements comparable to those found in the common law offenses. Mere similarity of the modern crime to a common law offense, without regard to the common law jury eligibility of that offense, is not enough.[11] Likewise, similarity between the modern offense and another modern offense for which a jury eligible common law antecedent exists is also not enough. Rather, to be jury trial eligible, the modern offense must have substantially similar elements to a common law offense that was itself jury trial eligible.

(1) The Right to a Jury Trial Prior to Arizona Statehood

It is clear that Arizona territorial law liberally granted an absolute right to a jury trial for all criminal offenses. In 1863, the Untied States Congress established Arizona as a Territory. Article 8 of the Territorial Bill of Rights, adopted on October 4, 1864, provided:

> The right of trial by jury shall be secured to all, but a jury trial may be waived by parties in civil cases in the manner prescribed by law.

---

[6] *Derendal*, 104 P.3d at 156.
[7] *Id.*
[8] *Derendal*, 104 P.3d at 150.
[9] *Id.*
[10] *Id.* (quoting *Bowden v. Nugent*, 26 Ariz. 485, 491, 226 P. 549, 551 (Ariz. 1924)).
[11] *See Derendal*, 104 P.3d at 156; *Donahue v. Babbitt*, 26 Ariz. 542, 550, 227 P. 995, 997 (1924); *State v. Harrison*, 164 Ariz. 316, 319, 792 P.2d 779, 782 (App. 1990).

Similarly, the first Penal Code of 1887, also referred to as the "Howell Code," contained the following provision guaranteeing every person the right to a jury trial for all public offenses:

> Section 14. No person can be convicted of a public offence, unless by a verdict of a jury accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer to the indictment in the case, mentioned in this chapter.[12]

Identical language to this provision also appeared in each of the three subsequent revisions of the Arizona Code.[13] The Howell Code also contained the following provision, hand-written by the scrivener, regarding the conduct of misdemeanor jury trials:

> Sec. 1582. Issues of fact must be tried by Jury unless a trial by jury be waived in criminal cases not amounting to felony by consent of both parties expressed in open court and entered in its minutes. In cases of misdemeanor the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court.[14]

With respect to jury trials, the 1901 Penal Code provided that:

> Sec. 1191. A trial by jury shall be had if demanded by either the territory or the defendant; but unless such demand is made before the commencement of trial, a trial by jury shall be deemed waived. . . .[15]

From these authorities, I conclude that the statutory right to a jury trial existed in Arizona for all misdemeanor and felony offenses prior to, and at the time of statehood. It is quite clear from the territorial statutes that existed prior to Arizona statehood, that jury trials for misdemeanor offenses were regularly held. However, I find that such misdemeanor jury trials were held pursuant to statutory authority, rather than common law authority.

(2) The Offense of Threatening and Intimidating Was Not an Offense Cognizable Under Territorial Law

Petitioner asserts that the offense of Threatening and Intimidating was a statutory crime pursuant to Arizona Territorial law. Although Threatening and Intimidating was not separately defined in the 1901 Arizona Penal Code, the word "threatening" was listed as part of the

[12] The Howell Code, Chapter XI, Part I, § 14.
[13] See Laws, Ch. XI, § 583 (1871); Penal Code, § 2217 (1887); and , Penal Code, § 1191 (1901).
[14] Penal Code, Chapter VI, § 1582 (1887).
[15] Penal Code, Title XI, § 1191 (1901).

definition of "disorderly conduct." In support of his argument, Petitioner refers the Court to the offense of "disorderly conduct" as it was defined in the 1901 Penal Code. The 1901 Penal Code defined "disorderly conduct" as:

> …any person who maliciously and willfully disturbs the peace or quiet of any neighborhood, family or person by loud or unusual noise, or by tumultuous or offensive conduct, or by threatening, traducing, quarreling, challenging to fight or fighting, or who applies any violent or abusive or obscene epithets to another…"[16]

Identical language to the 1901 Penal Code also appeared in Section 423 of the 1913 Penal Code. Petitioner reasons that because the word "threatening" was used in the Territorial Code to define "disorderly conduct," that this made "threatening," itself, a crime. This Court disagrees.

Threatening and Intimidating pursuant to the current A.R.S. § 13-1202 was not a statutory crime prior to the adoption of the Arizona Constitution merely because the 1901 Arizona Territory Code definition of disorderly conduct mentioned the word "threatening", as Petitioner argues. Nor are the elements comparable. The term "threatening" was merely used as one possible element of disorderly conduct. Disorderly conduct was a more general offense requiring that the peace or quiet of a neighborhood, family or person be disturbed. In addition, the crime of disorderly conduct required a "malicious" and "willful" mens rea.[17] There is no culpability requirement for Threatening and Intimidating pursuant to the current statute, A.R.S. § 13-1202. More importantly, the Arizona Supreme Court has noted that the offense of disorderly conduct was not jury-eligible at common law.[18] Petitioner points to no other section existing prior to the adoption of the Arizona Constitution which codified Threatening or Intimidating as a crime. This Court concludes that the offense of Threatening and Intimidating was not an offense cognizable under Arizona Territorial law. Even if the offense were codified in Arizona Territorial law, the right to a jury trial would have been granted pursuant to statutory, rather than common law authority.

(3) There is No Common Law Right to a Jury Trial for the Offense of Threatening and Intimidating

If a defendant had a right to a jury trial under the common law at the time the Arizona Constitution was adopted, that right was preserved by the Arizona Constitution. As previously noted, *Derendal* makes clear that in order to qualify for jury trial eligibility, a modern offense must have a clear link to a common law offense in either exact or same grade/character. Case law illustrates that Arizona has long used broad common law concepts transported from England,

[16] Penal Code, § 11-379 (1901).
[17] See *id.*
[18] *State ex rel. Baumert v. Superior Court In and For Maricopa County*, 127 Ariz. 152, 153-54, 618 P.2d 1078, 1079-80 (1980).

as amended by parliamentary statute, as the benchmark for Arizona's common law.[19] Common law is not the statutory Arizona Territorial law as it existed when the Arizona Constitution was adopted. Rather, the Arizona Supreme Court has traced the adoption of the common law in Arizona as follows:

> Let us, therefore, look to the common law to determine the nature and extent to the right which it gives, so far as Arizona is concerned. Our legislature first adopted the common law in the Howell Code in the following language.
>
> > 'The common law of England, so far as it is not repugnant to, or inconsistent with the Constitution and Laws of the United States, or the Bill of Rights or laws of this Territory, is hereby adopted, and shall be the rule of decision in all of the Court's of this territory.'
>
> It was soon discovered that in many features the old common law was inapplicable to our conditions, and in 1887 the language above-set forth was modified by paragraph 2935, Code of 1887, to read as follows:
>
> > 'The common law of England so far only as it is consistent with and adapted to the natural and physical condition of this territory, and the necessities of the people thereof, and not repugnant to, or inconsistent with the Constitution of the united States, or Bill of Rights, or Laws of this Territory, or established customs of the people of this territory, is hereby adopted and shall be the rule of the decision in all of the courts of this territory.'
>
> And it is substantially in this form that it has been carried forward through the Codes of 1901 (paragraph 2533) and 1913 (paragraph 5555) into that of 1928 (Sec. 3043).[20]

In context of these statutes, the Arizona Supreme Court has interpreted Arizona common law through legislation to mean:

---

[19] See *Patterson v. Connolly*, 51 Ariz. 443, 445, 77 P.2d 813, 814 (1938); *Masury & Son v. Bisbee Lumber Co.*, 49 Ariz. 443, 68 P.2d 679 (1937).

[20] *Masury and Son v. Bisbee Lumber Co.*, 49 Ariz. 433, 460-461, 68 P.2d 679, 688 (1937).

> [T]he unwritten or common law of England, together with acts of parliament of a general nature, not local to Great Britain, which had been passed and were enforced at time of separation of colonies from the mother country so far as they are suitable to wants, conditions, and circumstances in Arizona.[21]

The current statute, A.R.S. § 1-201, regarding the common law in Arizona provides as follows:

> The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.[22]

Therefore, Arizona adopts the common law only insofar as it is not inconsistent with our statutes. As noted previously, the offense of Threatening was not an offense prior to Arizona statehood. Furthermore, Petitioner has failed to provide this Court with any evidence that the offense of Threatening or Intimidating existed and required a jury trial at common law. Accordingly, this Court concludes that it would be inconsistent with the definition of the common law as it exists in Arizona for this Court to find that the crime of Threatening required a jury trial at common law.

B. The Right to Jury Trial Secured By Article II, §§ 23 and 24 of the Arizona Constitution

The Petitioner argues that Article II, §§ 23 and 24 of the Arizona Constitution guarantees a jury trial right to all criminal defendants. Article II, Section 23, as amended in 1972, currently provides that:

> The right of a trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.

Article II, § 24 further provides that:

[21] *Id.* at 463.
[22] A.R.S. § 1-201 (2005).

> In criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . .

Arizona case law is clear with regard to the construction and application of the current Article II, Section 23. This section does not give the right to a jury trial but guarantees preservation of such right. In other words, the right is applicable only where it existed under common law at time this section was adopted.[23] Moreover, statutory jury trial rights existing at the adoption of the Arizona Constitution were not preserved by Article II, § 23.[24] The constitutional guarantee of a trial by jury is not a grant, but a preservation of a pre-statehood right. Thus, only those offenses linked to jury trial at common law at the time the constitution was adopted are protected by the constitutional guarantee.[25]

In addition, it is well established that the right to a jury trial possessed by criminal defendants under the Arizona Constitution does not apply to petty offenses.[26] Only the right to a jury trial for serious offenses has been preserved for criminal defendants by both the federal and state constitutions, rendering serious offenses jury trial eligible while petty offenses are not.[27] Therefore, Article II, Section 23 does not independently grant a right to a jury trial to all criminal defendants, but preserves the right to a jury trial for those accused of serious offenses.[28] The offense of Threatening or Intimidating under A.R.S. § 13-1202 is a class one misdemeanor with a maximum jail term of six months, and as such, is presumed as a petty offense.

In sum, the Court is unable to find any case law or legislative history that would indicate that Article II, Section 23 mandates a jury trial for the misdemeanor offense of Threatening or Intimidating. However, this Court does acknowledge the importance of the preservation of a jury trial right where such right exists. As Justice Scalia recently noted:

> That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.[29]

In this case, however, the Court is unable to find any preservation of such a right as it existed at common law for the misdemeanor offense of Threatening or Intimidating.

---

[23] *Goldman v. Kautz*, 111 Ariz. 431, 531 P.2d 1138 (1975); *Rothweiler v. Superior Court of Pima County*, 100 Ariz. 37, 410 P.2d 479 (1966); *State v. Cousins*, 97 Ariz. 105, 397 P.2d 217 (1964); *Brown v. Greer*, 16 Ariz. 215, 141 P. 841 (1914).
[24] *State v. Roscoe*, 145 Ariz. 212, 226, 700 P.2d 1312, 1326 (1984); *Miller v. Thompson*, 26 Ariz. 603, 609-10, 229 P. 696, 698 (1924); *Hoyle v. Superior Court*, 161, Ariz. 224, 229, 778 P.2d 259, 264 (App. 1989).
[25] *Benitez v. Dunevant*, 198 Ariz. 90, 7 P.3d 99 (2000).
[26] *Id*.
[27] *Raye v. Jones*, 206 Ariz. 189, 76 P.3d 863 (App. 2003).
[28] *Derendal v. Griffith*, 104 P.3d 147, 150 (2005).
[29] *Blakely v. Washington*, 124 S.Ct. 2531, 2538-39, 159 L.Ed.2d 403, 72 USLW 4546 (2004).

C. The Misdemeanor Offense of Threatening and Intimidating is Not a "Serious" Offense

As articulated in *Derendel*, when the legislature classifies an offense as a misdemeanor, punishable by not more than six months incarceration, the offense will be presumed "petty," falling outside of the jury trial entitlement of Article II, Section 23 of the Arizona Constitution.[30] To rebut this presumption, a misdemeanor defendant must show that the offense qualifies as a "serious offense." First, the penalty must be derived from statutory Arizona law.[31] Second, the consequence must be severe.[32]

The fines and periods of maximum incarceration for the offense of Threatening or Intimidating all fall within the parameters of other misdemeanor offenses. Even the potential jail time is easily within the statutory maximum for misdemeanors of six months. Therefore, I find that the Petitioner has not met his burden in this case of overcoming the presumption that the misdemeanor offense of Threatening or Intimidating is petty, or that it carries additional severe, direct, statutory consequences that would reflect the legislature's judgment that the offense is "serious" to entitle him to a jury trial.

V. Conclusion

Pursuant to the test set forth in *Derendal*, the Petitioner is not entitled to a jury trial in this case. The modern day crime of Threatening or Intimidating was not jury trial eligible either at common law or at the time of Arizona Statehood. Therefore I find that Arizona law does not provide a constitutional right to a jury trial for the misdemeanor offense of Threatening or Intimidating. Accordingly, the Respondent Judge did not err in denying Petitioner's request for a jury trial.

IT IS THEREFORE ORDERED accepting jurisdiction in this Special Action.

IT IS FURTHER ORDERED denying the relief requested.

[30] *Derendal v. Griffith*, 104 P.3d 147, 153 (Ariz. 2005).
[31] *Id.*
[32] *Id.* at 154.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT